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No. 06-1475

11-6-07

In the Supreme Court of the United States

JOSHUA HALE, JOSEPH HALE, FKA NAVA S. SUNSTAR, AND ELISHABA HALE, FKA BUTTERFLY SUNSTAR, PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, directs the Secretary of the Interior to give owners and occupiers of land surrounded by federal lands protected by ANILCA "adequate and feasible access" to their land, "subject to reasonable regulations" issued by the Secretary "to protect the natural and other values of such lands." 16 U.S.C. 3170(b). The question presented is whether, when a landowner requests an access permit from the National Park Service, ANILCA precludes the National Park Service from evaluating the request pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

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OPINIONS BELOW

The second amended opinion of the court of appeals (Pet. App. A1-A12) is reported at 476 F.3d 694. The first amended opinion of the court of appeals (Pet. App. B1-B10) is reported at 461 F.3d 1092. The initial opinion of the court of appeals (Pet. App. C1-C5) is reported at 437 F.3d 892. The opinion and order of the district court (Pet. App. D1-D15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2007. The petition for a writ of certiorari

was filed on May 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who own a parcel of land surrounded by the Wrangell-St. Elias National Park and Preserve in Alaska, challenge the decision of the National Park Service (NPS) to conduct an environmental assessment before permitting petitioners to drive a bulldozer and trailer across Park lands to their property. The district court dismissed petitioners' challenge for lack of jurisdiction. The court of appeals concluded that the district court did have jurisdiction, but that, under the circumstances of this case, the NPS acted reasonably in requiring an environmental assessment.

1. The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, created several new units of the National Park System, including the Wrangell-St. Elias National Park and Preserve (Park), 16 U.S.C. 410hh(9). The statute authorizes the use of certain forms of transportation on these protected lands, including snow machines, motorboats, airplanes, and nonmotorized surface transportation methods, subject to "reasonable regulations" by the Secretary of the Interior (Secretary). 16 U.S.C. 3170(a). It further authorizes the use of other methods of transportation "where such use is permitted by this Act or other law." *Ibid.*

The statute also confers certain rights of access to owners and occupiers of property surrounded by protected lands. The statute provides:

> Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land * * * is within or is effectively surrounded by one or more conservation system

> units, * * * the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

16 U.S.C. 3170(b).

Department of the Interior (Department) regulations provide that the owner or occupier of an "inholding" who seeks to use a method of access not enumerated in Section 3170(a) must obtain a permit. 43 C.F.R. 36.10(b)-(c). The relevant agency (in this case, the NPS) must then inform the applicant whether the application contains the required information or is deficient. 43 C.F.R. 36.10(d) (incorporating requirements of 43 C.F.R. 36.5(c)(1)-(2)). If the application is deficient, the applicant must furnish any requested additional information within 30 days. 43 C.F.R. 36.5(d). Before issuing a permit, the agency must determine whether an environmental assessment or an environmental impact statement is required. 43 C.F.R. 36.6. To make that determination, the agency applies the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the Council for Environmental Quality regulations, 40 C.F.R. Pts. 1500-1508. 43 C.F.R. 36.6.

NEPA requires the preparation of an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). If an agency's regulations do not require an environmental impact statement, an agency may prepare an environmental assessment to determine

the significance of the effects of a "major Federal action[]." 40 C.F.R. 1501.4, 1508.9. An agency must prepare at least an environmental assessment unless the action falls within a group of activities called "categorical exclusions," which are actions that do "not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. 1507.3(b)(2)(ii), 1508.4.

2. In 2002, petitioners purchased approximately 410 acres of land completely surrounded by the Park. Petitioners' property is connected to the town of McCarthy, Alaska, by the vestiges of a road known as the McCarthy-Green Butte Road (MGB Road). Approximately thirteen miles of the road are located within the Park. In 1938, the Alaska Road Commission listed the road as "abandoned." By the time petitioners purchased the property, the MGB Road's bridges had washed away, and the road itself had become so overgrown that it was little more than a trail. After petitioners purchased their property, their primary use of the trail was on horseback. Pet. App. A3.

In the fall of 2002, petitioners began bulldozing the route where the MGB Road had once been. C.A. E.R. 87-88. The NPS notified petitioners that unpermitted use of a bulldozer along the route was illegal, and posted a public notice stating that the route may not be used for motorized travel other than by snow machine. C.A. E.R. 91, 93; C.A. Supp. E.R. 4-8.

In the spring of 2003, petitioners' house burned down. In July 2003, petitioners' father, Robert Hale,[1] sent an electronic mail message to NPS officials stating that he wanted "a permanent permit to 'dead' head a

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[1] Robert Hale is a plaintiff and was an appellant in the court of appeals, but did not join his children's petition for a writ of certiorari.

bulldozer with a trailer" between McCarthy and petitioners' property. C.A. E.R. 26; Pet. App. A3. Two days later, the Park Superintendent responded by offering to assist petitioners in completing the necessary permit application. C.A. E.R. 26; Pet. App. A3. Petitioners did not respond.

In September 2003, the NPS received from petitioners an "emergency" application for a bulldozer access permit to transfer supplies before "freeze up." Pet. App. A3. Responding promptly by letter, the NPS asked for clarification as to the nature of the "emergency" and for more information about the nature and frequency of the proposed bulldozer use. *Id.* at A4. The NPS also noted that permits "ha[d] been granted in the past for access to inholdings with heavy equipment such as bulldozers during the winter months when the ground is protected by snow of sufficient depth," and that "[t]ravel over unfrozen ground causes significantly more damage." C.A. E.R. 123; Pet. App. A4. The NPS informed petitioners that, because such travel "falls outside of any environmental assessment previously undertaken by the Park," petitioners' permit request would likely require an environmental assessment. *Ibid.*

Robert Hale responded by providing some, but not all, of the information the NPS needed to process petitioners' permit application. Pet. App. A4. The NPS thereafter informed petitioners that their request did not fall within the "emergency exception" to NEPA, see 40 C.F.R. 1506.11, and thus that an environmental assessment would be required. Pet. App. A4. The NPS proposed that it would prepare an environmental assessment and make a decision within nine weeks, even though its regulations allowed nine months, see 43 C.F.R. 36.6(a)(1), and offered to waive the costs of the

environmental assessment process. Pet. App. A4. Petitioners did not respond to the NPS's proposal. They instead filed suit in November 2003, claiming, among other things, that the NPS had deprived them of their statutory right to "adequate and feasible" access to their inholding. *Id.* at A4-A5.

3. On November 18, 2003, the district court dismissed petitioners' challenge for lack of jurisdiction. Pet. App. D1-D15. The court held that the NPS could reasonably require petitioners to obtain a permit prior to driving a bulldozer and trailer over Park lands on the abandoned road. *Id.* at D8-D12. The court then concluded that, because the NPS had not made a final decision on petitioners' permit application, there was no reviewable final agency action for purposes of the Administrative Procedure Act (APA), 5 U.S.C. 701-706. Pet. App. D12, D14-D15.

4. In January 2004, after the district court's decision, and after the NPS received the necessary information from petitioners, the NPS prepared an environmental assessment. C.A. E.R. 205-237. On March 12, 2004, the NPS tendered a permit for petitioners' signature that authorized petitioners to make 18 one-way trips by bulldozer or similar vehicle within a period of approximately one year, subject to certain conditions. Pet. App. F1-F9. Those conditions included "the ground being frozen to a minimum depth of 6 inches and the existence of snow cover sufficient to protect the resources." *Id.* at F4. Petitioners never signed the permit.

5. The court of appeals affirmed the decision of the district court. Pet. App. C1-C5. In a decision dated February 9, 2006, the court of appeals ruled that the district court properly dismissed the suit for lack of jurisdiction. *Id.* at C5.

Petitioners then filed a petition for panel rehearing and rehearing en banc. The panel withdrew its opinion, substituted a new published opinion, and denied the rehearing petition. Pet. App. B1-B10. In the amended opinion, dated August 25, 2006, the panel held that jurisdiction was appropriate under the collateral order doctrine, see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), because petitioners' claim that their access to their property cannot be made subject to a NEPA analysis would be "effectively lost" if petitioners were made to wait for the outcome of that analysis to prosecute their challenge. Pet. App. B5-B8.

The court held, however, that petitioners' challenge failed on the merits. Citing *United States* v. *Vogler*, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989), the court concluded that the NPS may reasonably regulate petitioners' use of the MGB Road, even if, as petitioners contended, the road qualifies as a right-of-way. Pet. App. B8-B10. The court further concluded that the Department's regulation incorporating NEPA review into its permit-granting process falls within the scope of "reasonable regulation[]" of inholder rights of access under ANILCA, since such review helps the Department "in fulfilling its statutory duty under ANILCA to balance 'adequate and feasible access' with the protection of 'natural and other values [of the lands].'" *Id.* at B10.

Petitioners filed a petition for a writ of certiorari, No. 06-960 (filed Jan. 5, 2007). On February 5, 2007, while the petition was pending, the court of appeals *sua sponte* issued a second amended opinion. Pet. App. A1-A12. In its second amended opinion, the court of appeals added that, while it saw "no *per se* conflict" between conducting NEPA review and granting ANILCA access,

such a conflict might arise "depending on the nature of the application and the possible time and cost involved in a NEPA review." *Id.* at A11. The court concluded that no such conflict arose in this case, however, because the NPS's decision to conduct an environmental assessment was reasonable given that petitioners' "out-of-the-ordinary request" to make multiple trips with a bulldozer and trailer over an abandoned, overgrown road, before "freeze up," risked substantial harm to the natural environment. *Id.* at A11-A12. The court also noted that, by offering to complete the environmental assessment in nine weeks and without cost to petitioners, the NPS "appears to have done everything it could * * * to facilitate reasonable access to their property." *Id.* at A12.

Following the court's second amended opinion, petitioners withdrew their then-pending petition for a writ of certiorari based on the August 25, 2006 opinion.

ARGUMENT

The court of appeals' decision is correct, and it does not conflict with any decisions of this Court or of other courts of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly held that the NPS acted reasonably in requiring an environmental assessment before granting petitioners' "out-of-the-ordinary request" to drive a bulldozer and trailer over Park lands on an abandoned road. Pet. App. A11.

Under ANILCA, the Secretary must give inholders "such rights as may be necessary to assure adequate and feasible access." 16 U.S.C. 3170(b). "Such rights" are, however, "subject to reasonable regulations issued by the Secretary to protect the natural and other values of

[federally protected] lands." *Ibid.*; see also 16 U.S.C. 1 (directing the NPS to "regulate the use" of parks and other protected areas "to conserve the scenery and the natural and historic objects and the wild life therein * * * by such means as will leave them unimpaired for the enjoyment of future generations").

The Department has determined that "reasonable regulation[]" of access under ANILCA is best accomplished through a permitting process that applies NEPA to determine whether an envir .mental assessment or an environmental impact statement is required, and to conduct such analyses in appropriate cases. See 43 C.F.R. 36.6(a), 36.10. That process of environmental review allows the NPS to determine how a given route or method of access might affect protected lands, and to set conditions of access that will minimize harm to National Park resources.

Although petitioners acknowledge that Section 3170(b) allows the NPS to subject their access to reasonable regulations to protect Park lands, petitioners contend that requiring NEPA review necessarily deprives inholders of the "adequate and feasible access" guaranteed by ANILCA "because owners are totally deprived of the statutorily mandated right *during the review*." Pet. 11-12 (emphasis added). Petitioners' contention is without merit. Were petitioners' argument correct, any delay associated with the review of a permit application—whether to conduct NEPA review, to review and evaluate the request, to process the request administratively, or to investigate an application by, for example, verifying an inholder's claim to ownership—would contravene ANILCA by delaying access. This is not the law.

Moreover, as a practical matter, landowners are in most cases able to anticipate their access needs and file a permit application in advance, preventing any disruption in access. When emergency circumstances exist that require immediate action with significant environmental impact, NEPA regulations allow "alternative arrangements." 40 C.F.R. 1506.11. In this case, the NPS determined that petitioners' access request did not fall within the emergency exception, Pet. App. A4, and petitioners have not challenged that determination.

Nor does the record support petitioners' repeated suggestions that, by conducting an environmental assessment, the NPS unreasonably delayed "meaningful access" to petitioners' property. Pet. 14; see also Pet. 6-7, 17-18. The record shows that petitioners themselves delayed filing their application for an access permit, failed to cooperate with the NPS during the review process, and ultimately refused the permit the NPS proffered. Pet. App. A3-A5; see *id.* at A12.

Finally, the court of appeals in this case held that there was "no *per se* conflict" between the application of NEPA and the right of adequate and feasible access under Section 3170(b), but it observed that a conflict could arise in a particular case. Pet. App. A11. In the circumstances of this case, however, it found no such conflict because of the "out-of-the-ordinary" nature of petitioners' request to make repeated trips with a bulldozer and trailer over environmentally sensitive lands. See *ibid.* That case-specific determination raises no issue warranting this Court's review.

2. Petitioners claim (Pet. 14-18) that the court of appeals' decision conflicts with this Court's decisions in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004); *United States* v. *Students Challenging*

Regulatory Agency Procedures, 412 U.S. 669 (1973) (*SCRAP*); and *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976). Petitioners are incorrect. In each of those decisions, the Court held that a particular statutory provision deprived the relevant decisionmaker of the discretion to make decisions based on environmental impact, and was therefore inconsistent with NEPA review. See *Public Citizen*, 541 U.S. at 770 ("[B]ecause [the Federal Motor Carrier Safety Administration (FMCSA)] has no discretion to prevent the entry of Mexican trucks, [it] * * * did not need to consider the environmental effects arising from the entry."); *id.* at 768 ("FMCSA simply lacks the power to act on whatever information might be contained in the [environmental impact statement]."); *Flint Ridge Dev. Co.*, 426 U.S. at 787 ("preparation of an impact statement [under NEPA] is inconsistent with the Secretary's mandatory duties" under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.*, because it would be impossible to comply with both statutes); *SCRAP*, 412 U.S. at 692-698 (NEPA did not give a federal court authority temporarily to suspend railroad rates, where the Interstate Commerce Act, 49 U.S.C. 15(7) (1970), had "clearly taken away" such power).

By contrast, ANILCA—in the same subsection that provides that the Secretary shall give inholders rights to adequate and feasible access—expressly authorizes the Secretary to subject such access across protected lands to "reasonable regulations," in order "to protect the natural and other values of such lands." 16 U.S.C. 3170(b). As the court of appeals recognized, consideration of environmental impact is not just consistent with, but critical to, the proper implementation of that provision of ANILCA. See Pet. App. A11 ("NEPA helps rather than

hinders the NPS in fulfilling its statutory duty under ANILCA.").

3. Petitioners also contend (Pet. 18-21) that the decision below conflicts with the Tenth Circuit's decision in *Southern Utah Wilderness Alliance* v. *BLM*, 425 F.3d 735 (2005) (*SUWA*). Specifically, petitioners point to the Ninth Circuit's conclusion that, even if petitioners had a valid right-of-way over the MGB Road, that right-of-way would not prevent the NPS from imposing reasonable regulations on its use. See Pet. App. A10. Petitioners contend that this conclusion conflicts with the Tenth Circuit's decision that the holder of a valid right-of-way under the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (43 U.S.C. 932 (1970)) (repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-580, § 706(a), 90 Stat. 2793) (R.S. 2477), may maintain the right-of-way according to "the established usage of the route as of the date of repeal of the statute," without obtaining prior federal approval. *SUWA*, 425 F.3d at 746.

Contrary to petitioners' contention, the decision below does not conflict with the Tenth Circuit's decision in *SUWA*. Unlike this case, *SUWA* did not involve application of ANILCA, and thus did not consider the scope of "reasonable regulation[]" under that statute. Moreover, *SUWA* merely stated that counties holding R.S. 2477 rights-of-way can conduct routine maintenance without prior authorization from a federal land management agency; the Tenth Circuit neither addressed nor limited a federal agency's authority to require permits for potentially damaging uses of R.S. 2477 rights-of-way by private persons who use, but do not own, a right-of-way. Finally, contrary to petitioners' characterization (Pet. 20), their access request did not merely seek to continue

established uses of the route. Rather, as the court of appeals observed, "[t]heir request was tantamount to a request to rebuild and reopen the overgrown trail that the 'MGB road' had become in the two thirds of a century since it was abandoned." Pet. App. A11.

4. The court of appeals did not, as petitioners contend (Pet. 21-23), improperly resolve disputed factual issues that should have been litigated in the trial court in the first instance. Rather, the court of appeals properly based its review of the administrative action challenged in this case on the facts in the administrative record, which included the NPS's analysis of the damage that would arise from the access petitioners requested and the availability of alternative, less-damaging access during the winter when the ground was frozen and covered with snow and ice. Pet. App. A4, A11-A12; see, *e.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (when reviewing agency action under the APA, "the focal point for judicial review" is the administrative record, not "some new record made initially in the reviewing court").

5. Finally, even if review were otherwise warranted, this case would provide a poor vehicle because, as the district court correctly held, the APA did not authorize review of petitioners' claims in this suit. Pet. App. D15.

The APA provides for review only of "final agency action." 5 U.S.C. 704. Petitioners brought this suit before the NPS had taken "final agency action" on their request for access. An agency's decision to conduct an environmental assessment before taking final action on a matter is not itself a "final agency action"; rather, it is a preliminary determination that may be reviewed only on review of final agency action. If petitioners believed that the NPS was unduly delaying issuance of a permit—whether because of its preparation of an environ-

mental assessment or for some other reason—the proper course would have been an action to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).

The court of appeals held (Pet. App. A6-A9) that the district court could entertain petitioners' challenge, relying on the collateral order doctrine that has been applied in the distinct context of appellate review of district court decisions under 28 U.S.C. 1291. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S, 541, 546 (1949). For a non-final decision to qualify for immediate review under the collateral order doctrine, the decision must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

Assuming, *arguendo*, the collateral order doctrine is even applicable to judicial review of agency action, the decision in question—the NPS's decision to conduct NEPA review of petitioners' application for an access permit under ANILCA—does not satisfy the "separability" and "unreviewability" prongs of the doctrine. First, the NPS's decision to conduct NEPA review is not "completely separate" from the merits of the NPS's permitting decision. To the contrary, the two are inextricably related, because the NPS's review under NEPA is an aspect of its decision on the merits. As the court of appeals recognized, Pet. App. A11, the NPS uses the NEPA process to evaluate the impact of, and impose appropriate conditions on, access through the Park.

Accordingly, the NPS's NEPA review is not "collateral" to the substance of an ANILCA access permit.

Second, petitioners could have sought review of the NPS's decision to conduct NEPA review once the NPS took final agency action on petitioners' permit request. In concluding otherwise, the court of appeals reasoned that petitioners' challenge to NEPA review would be "effectively lost" if petitioners had to wait for the NPS to issue a final decision on their permit application, because the procedure that the NPS used in reaching its decision "will likely not be relevant" to review of the ultimate permitting decision. Pet App. A8. If the NPS's NEPA review process were not relevant to the ultimate permitting decision, however, petitioners' complaint would necessarily be limited to any potential delay that might arise from the process. As noted above, the APA provides a separate route of judicial review, apart from the provision for review of final agency action, for unreasonably delayed agency action. 5 U.S.C. 706(1). Thus, there was no need for the court of appeals to fashion a principle patterned after the collateral order doctrine as an exception to the final agency action requirement in order to give petitioners meaningful judicial review of their claim.

Both the final judgment rule and the APA's requirement of final agency action reflect the determination that the coherence and efficiency to be had from waiting for a final decision outweigh the costs of piecemeal review. See *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 878-879 (1994); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Petitioners were required to await the completion of the permitting process before seeking judicial review. Petitioners thus

were not entitled to relief in the case for that independent reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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